No. 2501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a corporation organized and existing under the laws of the State of Arizona,

Appellant,

vs.

L. D. STEPHENS and YOLO WATER AND POWER COMPANY, a corporation organized and existing under the laws of the State of California,

Appellees.

BRIEF FOR APPELLEES.

S. C. DENSON,
JOHN S. PARTRIDGE,
ALAN C. VAN FLEET,
Attorneys for Appellees.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a corporation organized and existing under the laws of the State of Arizona,

Appellant,

vs.

L. D. STEPHENS and YOLO WATER AND POWER COMPANY, a corporation organized and existing under the laws of the State of California,

Appellees.

BRIEF FOR APPELLEES.

Statement of Facts.

In 1906, the Colliers (husband and wife) agreed to sell certain lands in Lake County, California, to one Shuman. In 1907 Shuman assigned the contract to the California Industrial Company. Thereafter the contract was assigned to the Central Counties Land Company, hereinafter referred to as the Land Company. The Land Company and its predeces-

sors paid all but $7000 of the purchase price. The Land Company then applied to the appellee Stephens for a loan of $7000. Stephens agreed to loan the Land Company this sum, if the Land Company would assign him its rights under its contract and procure a conveyance of the land to him by the Colliers as security for the repayment of the loan. Accordingly Stephens paid the Colliers $7000 and the Colliers *conveyed the land to him.* The Land Company assigned its rights under the contract to Stephens and *Stephens agreed to convey the land to said Company on repayment of the said loan, said payment to be made to Stephens on demand* (Tr. pp. 15-16).

In short, the situation is this: The Land Company, a California corporation, holds a contract for the purchase of certain lands from the Colliers. The Land Company borrows money from Stephens, a resident of California, to complete the purchase. It is agreed between the Land Company and Stephens that Stephens will take a deed to the said property as security for the repayment of the loan. Stephens agrees to convey the land to the Land Company when he is repaid his loan.

This is the situation in 1913. On April 9, 1913, the Power and Irrigation Co. of Clear Lake, appellant herein, is organized as an *Arizona corporation.* The Central Counties Land Co., *a California corporation, assigns* its rights under the contract with Stephens to the Arizona corporation, and on April

25, 1913, the above entitled action is commenced in the lower Court.

In fairness to appellant it should be stated that the precise character of the transaction whereby the appellant herein acquired any right of action against Stephens is thus set forth in the complaint (Tr. pp. 9, 19) as follows:

> "That prior to the commencement of this action, the said Board of Directors of said defunct corporation, Central Counties Land Company, acting as Trustees for the benefit of the creditors and stockholders of said defunct corporation, duly sold, assigned, transferred and conveyed unto the plaintiff, above named, the aforesaid lands, and the full equitable title thereto has by mesne conveyances become vested in this plaintiff, and that plaintiff is now the lawful owner and holder thereof."

It is clear, however, that the land itself had been conveyed by the Colliers to Stephens, and while he held it merely as security, nevertheless, all that the Central Counties Land Co. could convey to the appellant were its *rights* under the contract with Stephens. The plaintiff, appellant here, if it can recover at all, can only recover *as the assignee* of the Central Counties Land Co. Surely the plaintiff is an assignee seeking to recover upon a chose in action, which chose in action is based on a contract, and it must therefore follow that since its assignor could not maintain this action, plaintiff cannot.

Argument on the Law.

I.

THE ACTION IS ONE TO REDEEM PROPERTY UNDER A CONTRACT OF MORTGAGE. IT IS CLEAR THAT SUCH AN ACTION FALLS WITHIN THE EXPRESS INHIBITION OF SECTION 24 OF THE JUDICIAL CODE.

Section 24 of the Judicial Code is as follows:

> "No District Court shall have cognizance of any suit * * * to recover upon any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The mischief which the statute was aimed to prevent was the colorable and collusive assignment, sale or transfer of the subject matter of a suit made for the mere purpose of conferring jurisdiction on the Federal Courts. In this particular case, the rule should apply with peculiar force, because it is evident that the Arizona corporation, formed less than a week before this suit was commenced, was organized for the express purpose of maintaining these actions in the Federal Court.

The Federal Courts early defined broadly the scope of the term "chose in action". The Judiciary Acts of 1789 and 1887-8 prohibited the Federal Courts from having "cognizance of any suit, except foreign bills of exchange, to recover the *contents* of any promissory note or other *chose in action* in

favor of an assignee", unless the suit might have been prosecuted in such court by the assignor.

Section 24 of the Judicial Code is of comparatively recent enactment. Instead of denying an assignee the right to recover *"the contents of a chose in action"* where his assignor could not do so, we have the Judicial Code denying the assignee the right to "recover *upon* a chose in action". We think that this new language of the Judicial Code should be kept in mind throughout this discussion. It should be remembered that we are not now dealing with the words "contents of a chose in action" *which would imply a subsisting contract having contents capable of recovery,* but we are simply dealing with the words "to recover upon a chose in action".

It was evidently the intent of those who drafted the Judicial Code to get away from the troublesome phrase "contents of a chose in action" and substitute "chose in action", a term of wider and more comprehensive scope.

The Supreme Court of the United States, discussing the scope of the Judiciary Act of 1789 in the case of *Bushnell v. Kennedy,* 76 U. S. 390, 19 L. ed. 736 (1870) defines "chose in action" as follows:

> "That the indebtedness here was a chose in action cannot be doubted for under that *comprehensive description* are included all debts, all claims for damages for breach of contract, or for torts connected with contracts."

But one limitation on the scope of the term "chose in action" is apparent in the decisions. The "chose

in action" embraced by the statute is a right of action arising *ex contractu* (from contract) not one arising *ex delicto* (from wrong or tort). This limitation was early enunciated by the Circuit Court in the case of *Simons v. Ypsilanti Paper Co.,* 33 Fed. 193, which has become a leading case on this subject.

The language of the court is as follows:

> "In Sheldon v. Sill, 8 How. 441, a bill in equity to foreclose a mortgage was held to be a suit to recover the contents of a chose in action, and not maintainable by an assignee who had taken title from a citizen of the same state as defendant. Mr. Justice Grier observed that the term 'chose in action' was one of comprehensive import; 'it includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel, or sum of money from another by action.' That the court subsequently receded from a portion of this language is evident from the case of Deshler v. Dodge, 16 How. 622, in which an action of replevin was held not to be within the exception of the statute. The court held that the phrase 'right to recover a personal chattel' used in the opinion in Sheldon v. Sill, *was not intended to authorize a recovery in specie or damages for a tortious injury to property,* but a remedy on the contract for the breach of it, whether such contract was for the payment of money or the delivery of a personal chattel."

And again:

> "The court takes an obvious and clear distinction between rights of action founded upon contracts—which contracts contain within themselves some promise or duty to be performed—and mere naked rights of action founded upon

> some wrongful act—some neglect or breach of duty to which the law attaches damages. 'A suit,' says Judge Shipman, 'to compel the performance of that promise or duty by securing to the plaintiff that which is withheld by the defendant is a suit to recover the contents of a chose in action;' but a mere right of action to recover damages imposed by law for delinquency is not within the prohibition of the statute, and the objection to the jurisdiction fails."

Turning now to the facts of the case at bar and applying the principles which the Federal Courts have laid down for our guidance, it is clear that this action is one to recover "upon a chose in action" as that term is aptly defined in *Bushnell v. Kennedy, supra,* and it is clear that the chose in action is one arising *ex contractu* and not *ex delicto.*

We are concerned with an action wherein the Power and Irrigation Co. seeks to redeem land held by Stephens under a mortgage.

> "Mortgage is a *contract* by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession."
>
> Civil Code of Cal., Sec. 2900.

An action to redeem property from a mortgage is an action by a mortgagor to enforce the mortgagee to fulfill his obligation to return the security on payment of the debt it was given to secure. It is an action to *specifically enforce the mortgagee's contract.* A mere statement of the situation seems to lead incontrovertibly to the conclusion that we

are here concerned with an action "upon a chose in action" arising *ex contractu* and that such an action comes within the express prohibition of the statute is too clear for argument.

II.

THE APPELLANT FIRST MAINTAINS THAT THE ACTION IS ONE TO ESTABLISH A RESULTING TRUST—NOT TO RECOVER UPON A CHOSE IN ACTION.

In support of this contention, appellant relies in part on the following cases:

Bayles v. Baxter, 22 Cal. 575;
Gerety v. O'Sheehan, 9 Cal. App. 448; and
Breitenbucher v. Oppenheim, 160 Cal. 98.

These are all cases where one person pays the consideration money for the purchase of land and the conveyance is made to another, and the court decides that the latter holds the title in trust for the person who pays the consideration. The decisions in these cases involved the right of the equitable owner to compel a conveyance by the person holding the bare legal title. The Court, in each case applied the rule laid down in Sec. 853 of the Civil Code of California, which provides that:

> "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

In the case at bar, however, we are not concerned with such cases. The Civil Code of California has wisely provided for a remedy in a case of the character above described, so that the person holding the property as trustee may be compelled to convey, despite the Statute of Frauds, Statute of Limitations and similar defenses. For the protection of parties to such a transaction, the law provides a resulting trust.

But these cases are not the case at bar. Here we have a case where one having a contract entitling him to the conveyance of certain land, borrows money from another to pay the purchase price, and has the owner of the land convey it to the lender to secure him for the borrower's debt. This transaction is embodied in an express contract. It is an ordinary case of mortgage, except that the borrower procures another to supply the security.

At least two of the cases cited by appellant so define this proceeding. In *Whitehouse v. Whitehouse,* 22 Cal. App. 565, the gist of the case is aptly set forth in the syllabus:

> "Where one person loans money to others with which to purchase real estate, and the title is taken in his name as security, he holds it as a trustee and mortgagee, and they, upon payment of the loan, are entitled to a conveyance from him."

The case of *Campbell v. Freeman,* 99 Cal. 546, involved a situation where the purchaser of the property borrowed money to complete the purchase, and

the owner conveyed directly to the lender for the purpose of securing the loan. The Court discussed the rights of the parties in the following language:

> "In such a case the grantee holds a double relation to the real purchaser, he is his trustee of the legal title to the land and *he is mortgagee for the money advanced for its purchase,* and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. *The conveyance is none the less a mortgage because it was conveyed to him directly by a third party,* to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed, with which to make the purchase."

The cases of *Thomas v. Jameson,* 77 Cal. 91; *Hellman v. Messer,* 75 Cal. 166, and *Walton v. Karnes,* 67 Cal. 255, are of like effect.

The appellant contends that it is seeking to establish a resulting trust, but as seen by the language of the Court in *Campbell v. Freeman,* supra, it is in reality seeking to redeem from a mortgagee. The fact that the Court in their discussions of the above cases saw fit to invoke section 853 of the Civil Code of California, and talk about "resulting trusts" does not alter the true status of the parties. The true status in which we find the appellant and the appellee Stephens is that of mortgagor and mort-

gagee, the former seeking to enforce his equity of redemption.

It seems perfectly clear then, that appellant is seeking to "recover upon a chose in action" arising out of a contract. His right is one which is recognized by the equity side of the District Court. The fact that his rights arising out of contract may be equitable in character does not change the application of Section 24 of the Judicial Code. That this statement is true will be clear from the case of *Wilkinson v. Wilkinson,* 29 Fed. Cas. No. 17,677, not unlike the case at bar in its salient features.

In this case the mortgagor assigned his equity of redemption to the plaintiff. The defendant mortgagee, had foreclosed his mortgage, satisfied his claim and held the excess. This was a bill by the assignee of the mortgagor against the mortgagee. The mortgagor and mortgagee were both residents of the same state, the assignee a nonresident. The Court dismissed the bill, saying:

> "I am of opinion that an *equitable assignee* of a claim to an account is within this restrictive clause. In Sere v. Pilot, 6 Cranch (10 U. S.) 335, Mr. Chief Justice Marshall, speaking of a suit in equity by an assignee for an account, says: Without doubt, assignable paper, being the chose in action most usually transferred, was in the minds of the legislature when the law was framed; and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts, those who could sue in virtue of *equi-*

table assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant, might, under certain circumstances be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts, as to exclude the same person, when the assignee of a particular note. The term *'other chose in action' is broad enough to comprehend either case,* and the word 'contents' is too ambiguous to restrain that general term. The contents of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account.

No substantial distinction in this respect can be made between a right to an account of sales of mortgaged property, and any other right to an account. They are all choses in action within the meaning of this law. They are rights to recover sums of money by means of suits; *and whether the right be legal or equitable, whether the assignment thereof passed a legal title so as to enable the assignee to sue in his own name at law, or only an equitable title to be asserted through the aid of a court of chancery, it was equally the purpose of this restrictive clause to prevent the citizenship of the assignee from enabling him to come into a court of the United States.* Such, in general, was the view taken of it by the supreme court, in Sheldon v. Sill, 8 How. (49 U. S.) 441; and which was not modified by Dehsler v. Dodge, 16 How. (57 U. S.) 622 which explained its meaning."

In the case of *Sheldon v. Hill,* 8 How. 441; 12 L. ed. 439, we have the reverse of the case at bar. This was an action by the mortgagee to foreclose and the Court held that an assignee of a bond and mortgage bringing suit in the Circuit Court must show his assignee was competent to sue there.

Just as in that case the plaintiff was an assignee of a "chose in action" within the meaning of the statute, so, by a parity of reasoning is the plaintiff in the case at bar.

III.

APPELLANT'S FINAL CONTENTION IS TO THE EFFECT THAT APPELLANT IS NOT THE ASSIGNEE OF A CHOSE IN ACTION, BUT THE GRANTEE OF THE HOLDER OF AN EQUITABLE TITLE.

Now it may be true that the Central Counties Land Co., as between it and the Colliers, holding as it does a contract to purchase the land, is in equity the owner of the land and therefore has an equitable title thereto. But this in no way affects the relations between the Land Company and the appellee Stephens. As between them, the character of the Land Company's claim to the land is immaterial. The Land Company loaned Stephens $7000 and Stephens procured a conveyance from the Colliers of the land to secure the repayment of the loan. This was a separate and distinct transaction. When the Land Company invested appellant with its rights, it did not convey to appellant its equitable title in the land. In fact, we may here observe parenthetically that the Land Company *had parted with its equitable title,* for it assigned its rights under the contract of sale with the Colliers to Stephens when it procured the deed of the land. What the Land Company did was to assign to

appellant its rights under its contract of mortgage with Stephens. Therefore, the cases cited on pages 7, 8 and 9 of appellant's brief, which simply affirm the proposition that a grantee of an interest in real estate is not an assignee of a chose in action, are wholly inapplicable.

In conclusion, we respectfully submit that the appellant herein is an assignee seeking to recover upon a chose in action on which its assignor could not maintain an action, and that the judgment of the District Court dismissing plaintiff's complaint for want of jurisdiction was proper and should be affirmed.

Dated, San Francisco,
March 10, 1915.

S. C. Denson,
John S. Partridge,
Alan C. Van Fleet,
Attorneys for Appellees.